Calendar No. 538

78TH CONGRESS, 1st Session | SENATE | REPORT No. 530

POLL TAXES

NOVEMBER 12, 1943.—Ordered to be printed

Mr. MCFARLAND and Mr. VAN NUYS, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 7]

Together with the

MINORITY VIEWS

The Committee on the Judiciary, to whom was referred the bill (H. R. 7) making unlawful the requirement for the payment of a poll tax as a prerequisite to voting in a primary or other election for national officers, having considered the same, report favorably thereon and recommend that the bill do pass.

House bill 7 makes unlawful the requirement of the payment of a poll tax as a prerequisite to voting in a general or other election for national officers.

The principal question involved in this legislation is the constitutionality of the proposed legislation. The committee has reached the conclusion that the proposed legislation is constitutional and should be enacted into law. Those who believe it unconstitutional rely upon section 2, article I, of the Constitution which reads as follows:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

The qualification of a voter is believed to have something to do with the capacity of a voter. No State would have the constitutional authority to disqualify a voter otherwise qualified to vote, by setting up a pretended "qualification" that in fact has nothing whatever to do with the real qualification of the voter. No one can claim that the provision of the Federal Constitution above-quoted would give a

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

legislature the right to say that no one should be entitled to vote unless, for instance, he had red hair, or had attained the age of 100 years, or any other artificial pretended qualification which, in fact, had nothing to do with capacity or real qualification.

The evil that the legislation seeks to correct is in effect that in taking advantage of the constitutional provision regarding qualifications, the States have no right to set up a perfectly arbitrary and meaningless pretended qualification which, in fact, is no qualification whatever and is only a pretended qualification by which large numbers of citizens are prohibited from voting simply because they are poor. Can it be said, in view of the civilization of the present day, that a man's poverty has anything to do with his qualification to vote? Can it be claimed that a man is incapacitated from voting simply because he is not able to pay the fee which is required of him when he goes to vote? In other words, when States have prevented citizens from voting simply because they are not able to pay the amount of money which is stipulated shall be paid, can such a course be said to have anything to do with the real qualifications of the voter? Is it not a plain attempt to take advantage of this provision of the Constitution and prevent citizens from voting by setting up a pretended qualification which, in fact, is no qualification at all?

We believe there is no doubt but that the prerequisite of the payment of a poll tax in order to entitle a citizen to vote has nothing whatever to do with the qualifications of the voter, and that this method of disfranchising citizens is merely an artificial attempt to use the language of the Constitution, giving the State power to set up qualifications, by using other artificial means and methods which in fact have no relation whatever to qualifications.

However, the constitutionality in our opinion does not depend alone upon the language of the Constitution above quoted. There are other provisions in the Constitution and amendments to the Constitution to which we desire to call attention.

Section 4 of article I of the original Constitution reads as follows:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chasing Senators.

The subcommittee to which this proposed legislation was referred in the Seventy-seventh Congress held rather extended hearings and the full committee in this Congress has listened to very able and competent constitutional lawyers in the discussion of the constitutionality of the proposed legislation. These two provisions of the constitution above quoted have been discussed at great length and with great ability by some of the ablest constitutional lawyers in the country.

The pretended poll-tax qualification for voting has no place in any modern system of government. We believe it is only a means, illegal and unconstitutional in its nature, that is set up for the purpose of depriving thousands of citizens of the privilege of participating in governmental affairs by denying them a fundamental right—the right to vote.

The requiring of a citizen to pay a poll tax before he can vote is in effect the requiring of the payment of money to exercise the highest "qualification" of citizenship. It is in effect taxing a Federal function. The most sacred and highest of all Federal functions is the right to vote. It is not within the province of a State, or its legislature, to fix a fee

or tax which a voter must pay in order to vote and try, in this way, to come within the Federal Constitution by calling this a qualification.

Since voting is one of the fundamental governmental rights, the right to tax this fundamental privilege by a State would be giving to the State the power to destroy the Federal Government. No State can tax any Federal function. This is a proposition which will have to be admitted by all and, if this Federal function—the right to vote—can be taxed by a State then the State has a right to destroy this Federal function which is, after all, the foundation of any government. As a matter of self-preservation, the Congress in order to save the Federal Government from possible destruction, must have the right to prevent any State authority from destroying this cornerstone of the Government itself.

The right to vote for Members of Congress is a right, as the Supreme Court has said, granted under the Constitution of the United States and, therefore, any law, constitutional or statutory, of a State which taxes this fundamental privilege is contrary to the provisions of the Federal Constitution. It could be said, of course, if these poll-tax laws are unconstitutional, they could be taken to the Supreme Court and there challenged directly and that a law of Congress is therefore unnecessary to protect this constitutional right. This is undoubtedly correct but it does not follow that, when the Congress of the United States has had brought to its attention these poll-tax laws by which millions of our citizens are in effect deprived of their right to vote, that it would not be the duty of Congress itself to pass the necessary legislation to nullify such unconstitutional State laws. Most of these people are deprived of their right to vote by these poll-tax laws which are a method of taxation. As a rule they are poor people and are unable to vote because they are poor. The very fact that it is this class of people whose rights are being taken away makes it clear that they could not rely upon their constitutional rights of carrying their cases to the Supreme Court of the United States. The expense would be absolutely prohibitive and it is therefore the duty of Congress to protect these millions of citizens in their most sacred right as citizens—the right to vote.

We think a careful examination of the so-called poll tax constitutional and statutory provisions, and an examination particularly of the constitutional conventions by which these amendments became a part of the State laws, will convince any disinterested person that the object of these State constitutional conventions, from which emanated mainly the poll-tax laws, were moved entirely and exclusively by a desire to exclude the Negro from voting. They attempted to do this in a constitutional way but, in order to follow such a course, they deemed it necessary to even prohibit the white voter the same as they did the colored voter and hence they devised the poll-tax method which applied to white and colored alike. In other words, the poll-tax laws were prohibitive to all people, regardless of color, who were poor and unable to pay the poll tax.

It ought to be borne in mind also that many, if not all, of these constitutional amendments in the poll-tax States are in direct conflict with the statutes under which these States were readmitted to the Union under the act of Congress of June 26, 1870 (16 Stat., p. 62). The provision which refers to Virginia reads as follows:

> The Constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote, who are

entitled to vote by the constitution herein recognized, except as punishment for such crimes as are now felonies at common law, whereof they have been duly convicted under laws, equally applicable to all the inhabitants of said State: *Provided*, That any alteration of said constitution, prospective in its effect, may be made in regard to the time and place of residence of voters.

It therefore follows that these State poll tax constitutional amendments were in direct violation of this statute and therefore absolutely unconstitutional.

It seems perfectly plain that the object of this poll-tax provision in the State constitutions was not to prevent discrimination among the citizens but to definitely provide for a discrimination by which hundreds of thousands of citizens were taxed for the privilege of voting and that, therefore, under section 2 of article I of the Constitution, it seems plain that such a provision in the State constitution, or State law, was simply a subterfuge to accomplish other aims by resorting to the so-called qualification clause in section 2 of article I of the Constitution. It is likewise equally plain that at the end of the War between the States, when these States were readmitted to the Union, they were readmitted under a statute of Congress which provided explicitly that the constitutions of the States—

shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote.

It is therefore plain, under all the circumstances, that the so-called poll-tax laws of the State bringing about such a disqualification to its citizens in the exercising of suffrage is in clear violation of the laws of Congress in addition to being a violation of the Constitution of the United States. It is a clear violation of the agreement made by the State, when it was readmitted, that it should not provide for such discriminatory amendments to the State constitutions. It follows therefore that the so-called poll-tax laws, bringing about the disfranchising of its citizens in the exercise of suffrage, are a clear violation of the laws of Congress in addition to being a violation of the Constitution of the United States.

Those who believe the proposed legislation is unconstitutional rely on the statement of a historic fact that, when the Constitution was adopted, all of the original States had property or tax qualifications. This ignores entirely the testimony of scholars which clearly demonstrates why that fact alone does not prove the right of Congress today to forbid such requirements for voting in Federal elections. It seems to us that this regulation is subject to the criticism which Mr. Justice Holmes leveled against the use of history when he said:

It is revolting to have no better reason for a rule of law than that it is laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule persists from blind imitation of the past. (Holmes: The Path of the Law, in Collection Papers, p. 187.)

We think also Justice Holmes was right when, in discussing the situation in *Missouri* v. *Holland* (252 U. S. 416, 433), he said:

It [the Constitution] must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.

The constitutional provision relied upon to strike down this legislation as unconstitutional must be considered with other constitutional provisions.

In section 4, article IV, of the Constitution of the United States, it is provided:

> The United States shall guarantee to every State in this Union a Republican Form of Government * * *.

What does this mean in the light of the present-day civilization? Can we have a republican form of government in any State if, within that State, a large portion and perhaps a majority of the citizens residing therein are denied the right to participate in governmental affairs because they are poor? We submit that this would be the result if under section 2, article I, of the Constitution, the proposed law is held to be unconstitutional. The most sacred right in our republican form of government is the right to vote. It is fundamental that that right should not be denied unless there are valid constitutional reasons therefor. It must be exercised freely by free men. If it is not, then we do not have a republican form of government. If we tax this fundamental right, we are taxing a Federal privilege. We might just as well permit the States to tax Federal post offices throughout the United States.

Under the guise of a pretended qualification this provision of the Constitution, we believe, has been nullified every time a State has denied the right to vote to any of its citizens because they do not have the money to pay the State the fee set up as a pretended "qualification." We think that this fact has been fully demonstrated by requiring the payment of a poll tax for the right to vote.

It is conceded, we think, even by those who believe the proposed law is unconstitutional that, while the poll tax is comparatively small in amount, if any poll tax at all can be enforced so as to prohibit voting by those who do not have the fee, the principle involved would permit the State to fix a fee much higher than is usually fixed now, and it is not at all unlikely that, in carrying out the real provisions of the poll-tax laws, this amount could be increased so that the poll tax might be fixed at $10, $50, $100, or even greater. The constitutional right to fix any poll-tax fee concedes the right to fix that fee at any amount desired.

Section 1 of the fourteenth amendment to the Constitution of the United States reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It is quite clear that the so-called poll-tax laws do abridge the privileges and immunities of the citizens of the United States. If citizens of the United States are required to pay a poll tax, it is clearly an abridgement of their privileges and immunities.

It is said that section 2 provides an exclusive remedy for a violation of section 1 of the fourteenth amendment to the Constitution. Section 2 refers to the apportionment among the several States of representatives in Congress and provides for the reduction in the number of such representatives whenever the right to vote is denied. We do not think this remedy is an exclusive one. Section 1 of the fourteenth amendment to the Constitution is positive in its terms and says that no State shall make or enforce any law which is an abridgment of the privileges and immunities of citizens of the United States.

The sponsors of the poll-tax laws do not admit that they have prevented anyone from voting. In fact these laws do not, on their face, directly prohibit any citizen from voting. The effect is brought about by the levying of a poll tax and providing that the citizen must pay this poll tax in order to vote. While he is not denied the right to vote, he is taxed for this privilege and, in case of poverty, this results in a denial of the privilege of voting and thus directly interferes with the citizen's right to participate in governmental affairs. Section 1 of the fourteenth amendment to the Constitution says that this shall not be done, and these laws, therefore, come in direct conflict with section 1 of the fourteenth amendment.

The fourteenth amendment to the Constitution has other sections referring to the right to hold office by a Senator or Representative in Congress and with reference to electors for President and Vice President. Section 4 of this amendment refers to the public debt of the United States and prohibits the United States or any State from assuming or paying any debt or obligation incurred in aid of insurrection or rebellion against the United States. Section 2, as above stated, refers to the apportionment of Representatives among the several States.

There is no more reason why section 2 should modify section 1 than there is that section 3 or section 4 should be considered in connection with section 1.

It is quite clear that the so-called poll-tax laws do abridge the privileges and immunities of citizens of the United States. If any citizen of the United States is deprived of the privilege of voting by any of these poll-tax laws, it seems a clear abridgment of the privileges of citizens of the United States. One of the greatest privileges, and a fundamental one, of every citizen of the United States is the right to vote. If he is deprived of this right, he is denied the right to participate in governmental affairs. Such a citizen becomes an outcast. He is subject to all the laws of the State. His citizenhip is admitted and the burdens which rest upon him are the same as rest upon all other citizens. He can be drafted into the Army and be compelled to face the foe and give up his life to protect the lives of his fellow citizens. Yet he is deprived of the most sacred privilege of all—the right to vote. It is quite evident that all these poll-tax laws are in direct violation of section 1 of the fourteenth amendment to the Constitution as well as being in violation of other constitutional and Federal laws heretofore referred to.

MINORITY VIEWS

The undersigned members of the Committee on the Judiciary, who have had under consideration the bill (H. R. 7) making unlawful the requirement for the payment of a poll tax as a prerequisite to voting in a primary or other election for national officers, submit this minority report and recommend that the bill do not pass.

We believe that Congress is without power to enact the proposed legislation and desire to incorporate herein materials that we believe conclusively establish that fact. While it is our view that passage of this bill would not be a constitutional exercise of the national legislative power and base our recommendation particularly on that ground, we further believe that the present emergency is not a proper time for the submission of controversial matters such as are involved in this bill. We believe that the Congress should devote its energies to the enactment of legislation dealing with the many problems arising out of the war emergency, and that the attention of the whole country, now devoted to the war effort, should not be distracted by an issue such as this. Prolonged consideration of the alleged reform which this bill seeks by national action to accomplish, accompanied as it must be by sectional and other considerations, cannot fail to act as a deterrent to unified and harmonious action necessary for the prosecution of the war.

Much has been said and written on the constitutional aspects of this proposal. It is significant that even some of the proponents of this bill have doubts as to its constitutionality. As a matter of fact the bill itself acknowledges that Congress has no power to fix or alter the qualifications of voters and adopts the expedient of declaring that the poll-tax requirement is not a qualification of voters but an interference with the "manner" of holding a Federal election, a subject which may be regulated by Congress under section 4, article I. It is sufficient to say that, as is pointed out in the material appended to this report, there is not a single decision of the United States courts that even intimates that "manner" of conducting an election includes the qualification of electors.

The fallacy of the arguments in support of this bill is pointed out in an adverse report on a similar bill, made to the Committee on the Judiciary during the last Congress by a subcommittee of the committee, and printed in Senate Report 1662, Seventy-seventh Congress, second session (pt. 2). That subcommittee report sets out concisely the constitutional limitations affecting the subject matter.

As indicated in that report the provisions of the Constitution of immediate application are the following:

ARTICLE I, SECTION 2

The House of Representatives shall be composed of Members chosen every second Year by the people of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

ARTICLE I, SECTION 4

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The report points out that the framers of the Constitution accepted voting qualifications which were in force in various States by the language of section 2 of article I and that they nowhere gave Congress the power to alter them; that payment of a poll tax was one of these qualifications; and that while in section 4 of article I Congress was given power to alter State regulations governing the times and manner of choosing Senators and Representatives, as well as the places of choosing Representatives, no such power over voting qualifications was given.

It is submitted that if the Congress should pass this bill, which will clearly prescribe qualifications for electors of Federal officials other than those—

requisite for electors of the most numerous branch of the State legislature—

in some States, it would in the language of the report referred to—

be acting in direct contravention of the mandate of the Constitution that they should be the same.

Thus, as the subcommittee report demonstrates, adoption of the proposal embodied in House bill 7 will in effect ignore the mandate of language in the Constitution that it would be difficult to make more clear, and that was adopted in the light of an understanding on the part of the framers of the Constitution of laws of the several States with respect to poll taxes.

Questions of constitutional law cannot be settled by resorting to legislative fiction, such as is embodied in this bill in the declaration that what is plainly a "qualification" of voters shall not be deemed such a qualification.

The subcommittee report referred to so succinctly discusses the issues involved that it is set forth in full as follows:

POLL TAX QUALIFICATION FOR VOTING

(Mr. O'Mahoney, from the Committee on the Judiciary, submitted the following adverse report, to accompany S. 1280)

The subcommittee of five members, to whom was referred the bill (S. 1280) concerning the qualification of voters or electors within the meaning of section 2, article I, of the Constitution, making unlawful the requirement for the payment of a poll tax as a prerequisite to voting in a primary or general election for national offices, having considered the same make this report to the full Judiciary Committee recommending that the bill do not pass upon the ground that it would not be a constitutional exercise of the national legislative power.

In considering the measure, the following provisions of the Constitution are of immediate application:

ARTICLE I, SECTION 2

"The House of Representatives shall be composed of Members chosen every second Year by the people of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

ARTICLE I, SECTION 4

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

Distasteful from the point of view of popular sovereignty as may be State statutes which make the payment of a poll tax a prerequisite to voting, any attempt by the Congress to abolish such a tax, even in election to Federal office, would seem to be a clear violation of the Federal Constitution and beyond the power of Congress. This is a reform which may and, which if desired, should be effected by constitutional amendment.

If Congress has the right, by statute, to strike down a qualification for voting legally prescribed by a State, then it also has the power to impose additional qualifications. If it has the right to broaden the qualifications for voting in Federal elections, then it also has the right to narrow them. But the Constitution clearly prohibits such a result, for it provides in section 2 of article I that the electors who are to choose the Members of the National House of Representatives "shall have the qualifications requisite for electors of the most numerous branch of the State legislature." Obviously, if Congress should attempt to say that some electors qualified to vote for members of the most numerous branch of a State legislature should not be permitted to vote for Members of the National House of Representatives, it would be an open violation of the Constitution. Likewise, if it attempts, as this bill does, to say that persons who are not qualified to vote for members of the most numerous branch of a State legislature, may nevertheless vote for Federal offices, including Members of Congress, it would be equally in violation of the fundamental law.

It is acknowledged by the proponents of this bill that Congress has no power to fix or alter the qualifications of voters for State office and so they propose only to abolish the poll tax for election of Federal officials. To do this, they must deny that a poll tax is a "qualification." Otherwise, they would be forced to admit an attempt to disregard section 2 of article I. This they cannot do without conceding the unconstitutional character of the bill. So they adopt the ingenious ruse of declaring in the first section of the measure that the poll-tax requirement is not a qualification of voters but an interference with the "manner" of holding a Federal election and as such subject to regulation by Congress under section 4, article I. Here, however, they are met by the historic fact that when the Constitution was adopted all of the original States had property or tax qualifications for voters.

The framers of the Constitution knew, for example, that the actual payment of a State or county tax was a voting qualification in Pennsylvania when the instrument was drawn and that the other States had similar provisions. The framers accepted these qualifications whatever they might have been in all of the States by the language of section 2 of article I and nowhere did they give Congress the power to alter them. They did give Congress the power to alter State regulations governing the times and manner of choosing Senators and Representatives as well as the places of choosing Representatives, but no such supervisory power over voting qualification was granted. Certainly such power cannot be implied by contending that although the Constitution makers, who were perfectly familiar with property qualifications, did not have them in mind when writing section 2 of article I which deals with qualifications, but did intend to give Congress power to change them, when they wrote section 4 of article I which deals with the manner of holding elections.

It would be difficult to imagine any language more clear than the first clause of section 2, article I:

"The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, *and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.*" [Italics supplied.]

If Congress by law should undertake to provide, as the proponents of this bill urge Congress to do, qualifications for the electors of Members of the National House of Representatives other than and different from those "requisite for electors of the most numerous branch of the State legislature" in any State, it would be acting in direct contravention of the mandate of the Constitution that they should be the same.

Property qualifications and poll taxes are outmoded. Universal when the Government was formed, they have been abolished now in all of the States save eight, but they were abolished by the action of the people of the States themselves without compulsion from Federal authority.

It is better to await the wise action of the remaining States than by a strained construction of the Constitution to apply by statute the power of the Central Government to force upon any State a particular course of action in a field which the Constitution left to the States.

This view of the constitutional aspects of the bill before us is sustained by the testimony of an able lawyer, Mr. John F. Finerty, attorney for the Workers Defense League and of the American Civil Liberties Union, who, though testifying in support of the measure (hearings, p. 394), declared that in his opinion it could not be safely based, as it is based, on section 4, article I.

"Mr. FINERTY. That annotation in the United States Code, Annotated, leads me back to suggest to this committee that in my opinion the Pepper bill can only safely be based on article IV, section 4, of the Constitution, which is one guaranteeing to the States a republican form of government.

"Senator NORRIS. You mean section 4, article I.

"Mr. FINERTY. No; article IV, section 4, Senator Norris.

"Senator O'MAHONEY. In other words, what you say——

"Senator NORRIS. Section 4, article I, isn't it?

"Mr. FINERTY. No; I am referring to section 4, article IV. Article I I don't think is a safe reliance——

"Senator O'MAHONEY. As I understand, Mr. Finerty, it is that we cannot hope to argue from section 4 of article I that this is a bill which would come within the power of Congress to regulate the manner of holding elections.

"Mr. FINERTY. Well, Senator, that is something that I confess I have always had the greatest doubt, as to whether that section, conferring power to regulate the manner of holding elections, conferred power to prescribe qualifications, but I am not even going to touch on that. I would say that apparently the Classic has disposed of the doubt, so far as the Supreme Court is concerned, but what I want to point out is that I am referring to Mr. Sol Bloom's little compilation of the Constitution, is that article IV, section 4—I have found that the most convenient form in which to carry the Constitution around—section 4 of article IV reads:

"'The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.'

"Now then there is article I, section 2, and article——

"Senator O'MAHONEY. Now, do you mean to contend that under that provision of the Constitution, the Congress of the United States has the power, authority, and right, on its own initiative, to intervene in a situation which it judges to be an invasion or a violation of the republican form of government?

"Mr. FINERTY. Certainly, and not only do I believe that, but I believe its conclusion in that respect is not reviewable by the Supreme Court or any other court.

"The Supreme Court in *Texas* v. *White*, in 7 Wallace 730—I have the citation here, 7 Wallace 730—expressly held that was a question wholly within the power of Congress to decide as a political question.

"I want to point out, in answer to Senator Norris, that my doubt of the efficacy of either article I, section 2, or article I, section 4, to sustain the Pepper bill is because the Pepper bill forbids the poll tax in Presidential elections, and the election of Presidential electors. Neither article I, section 2 nor 4, has any reference whatever to Presidential elections, but apply entirely to Congress. Therefore, I think that primarily and fundamentally, the Pepper bill can be justified under article IV, section 4, to guarantee a republican form of government."

The provision urged by Mr. Finerty, namely section 4, article IV, is that which guarantees to every State "a republican form of government." That the framers of the Constitution did not regard property or poll-tax qualifications as in any sense in derogation of a republican form of government is proven by the fact that when they wrote section 4 of article IV they did not abolish those qualifications in Federal elections. Indeed, they undertook to deprive all citizens of the privilege of voting directly for President by putting the electoral college between the people and their chief executive officer.

The Constitution was an instrument designed to preserve a balance between State and Federal Government, between local and central power. In a time when circumstances compell the exercise of great central authority, the utmost care should be observed not to strike down unnecessarily the sovereign powers reserved to the States except in the manner carefully pointed out in the Constitution itself.

JOSEPH C. O'MAHONEY
TOM CONNALLY.
WARREN R. AUSTIN.

The views expressed in the foregoing report received ample support in the testimony of the distinguished lawyer and author, Mr. Charles Warren, at the hearing before the Judiciary Committee on November 2, 1943. Mr. Warren had been invited to give to the committee his views on the constitutionality of the proposed legislation. Although personally opposed to the requirement of a poll tax Mr. Warren was clearly of the view that the Congress had no power to abolish this requirement, which was solely a matter for State consideration. By reason of the eminence and standing of Mr. Warren in the field of constitutional law, and the unbiased character of his testimony, it is believed that it will be helpful to embody his statement in full as a part of these minority views.

COMMENTS ON MAJORITY REPORT

The minority views would not be complete without some comment upon the majority report. The arguments advanced in this document and appearing on pages 1 to 6 are so self-contradictory that in themselves they demonstrate conclusively the unconstitutionality of H. R. 7.

"The pretended poll-tax qualification for voting has no place in any modern system of government," we are told (p. 2). Why the emphasis on "modern"? Obviously because, as the report acknowledges, and we quote from page 4:

> Those who believe the proposed legislation is unconstitutional rely on the statement of a historic fact that, when the Constitution was adopted, all of the original States had property or tax qualifications.

Confronted by this plain "historic fact," that when the Constitution was adopted tax qualifications for voting were imposed by the States and were constitutional, the authors of the majority report say "It's not modern", and ask Congress to abolish the qualification without bothering to change the Constitution.

If the poll tax was constitutional when the Constitution was adopted, as the majority report acknowledges, what has happened since to make it unconstitutional? Why, times have changed!

When the people of the country decided that times had changed and that Senators should be elected by the people rather than by the legislatures of the various States, they changed the Constitution!

When the people decided that changing conditions made a national income tax desirable, they changed the Constitution.

When the people decided that slavery was outmoded and "had no place in any modern system of government," they changed the system of government by modernizing the Constitution.

When the people decided to deprive the States of the power to permit the manufacture and sale of intoxicating liquors, they did it in the only way it could be done; they changed the Constitution. Then when they decided that they wanted to abandon national prohibition, they did not rely on a statute, they changed the Constitution back again.

When the people decided that the "pretended sex qualification for voting had no place in any modern system of government," they did not try to give women the vote in every State by passing a law. They did it in the only way it could be done. They changed the system; they modernized the system by changing the Constitution.

What is the difference between the tax qualification and the sex qualification from the point of view of constitutional law? When the

Constitution was adopted all the States had tax qualifications, as the majority report points out, and they all had the sex qualification. What argument can be advanced for the statutory abolition of the poll-tax qualification that could not be made for the abolition of the practice of most of the States of denying women the right to vote? Were the women not citizens? Were they not as intelligent and able as men? Were they not as interested as men in the welfare of this country?

Why then did the women go to all the trouble of waging the long battle for a constitutional amendment? Why did they not say, as the advocates of this bill say on page 1 of the report, "the qualification of a voter is believed to have something to do with the capacity of a voter" and content themselves with asking Congress to change the Constitution by passing a law? Because they knew and Congress knew and everybody who had the slightest glimmering of comprehension of constitutional law knew that the Constitution gives the States the power to fix the qualifications of voters and, therefore, that the only legal way to give women the right to vote was to change the Constitution.

"The most sacred and highest of all Federal functions is the right to vote," says the majority report (p. 2). This, of course, is merely emotional, not legal, argument. Voting is a privilege and a responsibility. It is not a right.

The fifteenth amendment to the Constitution was adopted by the ratifying action of a sufficient number of States in 1870. The first section of the amendment reads:—

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

By the foregoing constitutional amendment (not by a statute) the States were forbidden to prescribe "race," "color," or "previous condition of servitude" as a qualification to vote. A fortiori, a constitutional amendment is necessary to prevent the States from prescribing the qualification of paying a tax as a prerequisite to vote—a right which now and since the founding of this Nation has existed in the several States.

How does it happen that the "right" of women to vote was denied in most of the States for 49 years after the fifteenth amendment was adopted? Obviously because the Constitution gives the States the power to fix the qualification by which the right to vote is determined. The States could legally fix the sex qualification until the Constitution was changed. They can legally fix the tax qualification until another change is made.

The only way to "modernize" the Constitution is to amend it.

But, the authors of the majority report, quoting section 4, article IV, of the Constitution, say, "The United States shall guarantee to every State in this Union a republican form of government. * * *" This is the ground on which we stand, say the proponents of statutory abolition. True, the founding fathers recognized this tax qualification as valid. True, they did not regard such a qualification as in derogation of the "republican form of government." But the founding fathers were old-fashioned. They were not "modern." They lived in a sort of dark age and could not be expected to distinguish between what is constitutional and what is not constitutional.

They could learn much from the majority report which reads:

What does this [sec. 4, art. IV] mean in the light of present-day civilization? Can we have a republican form of government in any State if, within that State, a large portion and perhaps a majority of the citizens residing therein are denied the right to participate in governmental affairs because they are poor? We submit that this would be the result if under section 2, article I, of the Constitution, the proposed law is held to be unconstitutional.

The proponents of H. R. 7 do not believe their own argument, as can be easily demonstrated by reading the bill. If it is a denial of the republican form of government for any State to impose a poll-tax qualification for voting, then it is equally a denial whether the elector is to vote for State or Federal officers. Indeed, since section 4, article IV, is a guaranty "to every State" it is a guaranty that State officers shall be selected in accordance with republican principles. Yet the authors of this bill deliberately exclude State officers from the application of the measure. They undertake only to abolish the poll tax for the electors of Federal officers and they base their case on a provision of the Constitution which obviously refers to State and not to Federal Government.

Of course, the whole question was carefully considered and carefully decided in the Constitutional Convention. Delegate Wilson of Pennsylvania, as reported by James Madison in volume 5 of Elliott's Debates, called to the attention of the Convention the impossibility of having one set of qualifications for the electors of State officers and another set for the electors of Federal office. Said he:

It would be very hard and disagreeable for the same persons at the same time to vote for representatives in the State legislature and to be excluded from a vote for those in the National Legislature.

This statement was made while the Convention was considering the contention of Gouverneur Morris of New York that the States should not be permitted to fix the qualifications of voters, but that these qualifications should be fixed in the Constitution. The proposal of Gouverneur Morris was rejected and the Constitutional Convention, after full consideration of the subject matter, decided that the States should have the power.

Gouverneur Morris made the matter very clear. He argued against the adoption of section 2, article I, which gives the States the right to fix the qualifications. This is how Madison reported the argument of Gouverneur Morris:

Another objection against the clause as it stands is that it makes the qualifications of the National Legislature dependent upon the will of the States which he thought not proper.

Here is the whole issue. Gouverneur Morris was arguing against section 2 of article I of the Constitution as it now stands and his argument was that it should be changed because it makes the qualifications of the National Legislature dependent upon the will of the States.

The Constitutional Convention heard Gouverneur Morris' argument and rejected it. It decided to vest the power of fixing the qualifications of voting in the States. There is only one way to change that, namely by constitutional amendment.

Tom Connally.
Warren R. Austin.
Carl A. Hatch.
Joseph C. O'Mahoney.
Charles O. Andrews.
Chapman Revercomb.

POLL TAXES

TUESDAY, NOVEMBER 2, 1943

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The committee met, pursuant to adjournment, at 10:05 a. m. in room 312, Senate Office Building, Senator Frederick Can Nuys (chairman) presiding.

Present: Senators Van Nuys (chairman), Connally, Murdock, Hatch, Austin, Danaher, McFarland, Revercomb, and Wiley.

Also present: Senators Byrd, Bilbo, Smith, Bankhead, Overton, and Caraway.

The CHAIRMAN. The committee will come to order, please.

This is the closing public hearing on House Resolution No. 7, commonly known as the antipoll-tax bill. You will remember we have had two public hearings prior to this in which the proponents of the bill introduced witnesses to testify to the constitutionality of the proposed legislation. The same opportunity is being offered today to the opponents of the bill and they will confine themselves to that one issue, namely, the constitutionality of the act or unconstitutionality of the act.

Senator Connally.

Senator CONNALLY. Mr. Chairman, I had some little agency in inviting Judge Charles Warren to address us on the subject of the pending bill for the reason that he is a very distinguished lawyer and has been the author of some outstanding and notable books that have attracted the attention of the bar of the whole country and he is not an applicant for office. Those are the main reasons that I induced him to come here, and I would like to put in the record a brief historical reference copied from Who's Who in the Law.

Judge Warren is a graduate of Harvard Law School and he has an LL. D. from Columbia University. He was a former associate of Moorfield Storey, whom many of you recall as an eminent lawyer in Boston. He has been in Washington since 1914 and was from 1914 to 1918 an Assistant Attorney General of the United States. He has been a lecturer at Princeton, Cornell, University of Illinois, University of Rochester, Boston University, University of Virginia, William and Mary, Northwestern University, and University of Chicago. He has been an overseer of Harvard College, a member of the Massachusetts Historical Society, of the American Society of International Law (honorary vice president), and a member of the Academy of Arts and Letters.

Judge Warren is author of History of Harvard Law School and Early Legal Conditions in America, in three volumes; History of the

American Bar, Colonial and Federal to 1860; The Supreme Court in United States History (1922, 1926), which I am sure many Senators have read and I have read it in its entirety. It is one of the most illuminating constitutional treatments that I have ever read, and for this Judge Warren was awarded the Pulitzer prize for best book on American history in 1922, three volumes; The Supreme Court and the Sovereign States (1924); Congress, the Constitution and the Supreme Court (1925, 1935). I have read that book and all three of them, in fact; The Making of the Constitution (1928, 1937); Jacobin and Junto, 1931; Bankruptcy in United States History (1935); Odd Byways of American History (1942). Those are among, Mr. Chairman, a few of the writings of Judge Warren.

Also he served as special master appointed by the Supreme Court of the United States in three interstate cases—*New Mexico* v. *Texas* (1924); *United States* v. *Utah* (1929); *Texas* v. *New Mexico* (1936); and in 1937, he was appointed by President Roosevelt as the American member of the Trail Smelter International Arbitral Tribunal which rendered its final decision in 1941.

Senator CONNALLY. You may proceed, Judge Warren.

The CHAIRMAN. For the purposes of the record, will you give your name and address?

STATEMENT OF CHARLES WARREN

Mr. WARREN. Charles Warren. My business address is 710 Mills Building, Washington, D. C.

The CHAIRMAN. You may proceed in any way you choose, Judge Warren.

Mr. WARREN. Thank you.

Mr. Chairman, honorable members of this committee: In order that you may not think that my argument on the constitutionality of this bill is colored by my personal views in favor of a poll tax, I desire to say that I consider that the requirement of a poll tax to make a man eligible to vote is, in fact, unjust and unreasonable and should be abolished by the sovereignty which created it and not by any other sovereignty, that is, by the State and not by Congress.

I was very much interested to read the printed hearings of the subcommittee of the Committee on the Judiciary of the Senate covering hearings in 1941 and 1942. I had a personal interest in various references contained in that volume because a number of the witnesses who appeared in favor of the bill cited the case of Gov. William E. Russell, of Massachusetts, who succeeded in obtaining the abolition of the Massachusetts State poll tax as a requirement for voting after a very vigorous campaign back in 1901.

I said I had a personal interest in that statement because I have a very vivid personal memory of it and personal contact with it. As a very young man, I was appointed private secretary to the Governor of Massachusetts by Gov. William E. Russell. He was the first Democratic Governor we had had in Massachusetts for about 25 years and before my appointment I had, in the previous years, taken some part in Governor Russell's campaign for the abolition of the poll tax as a requirement for voting. His campaign in that respect was successful and the Legislature of Massachusetts abolished it. At that time certainly there was no intimation that the United States

Congress had power to abolish it or that any request would be made to Congress to perform an act which at that time was supposed to be a futile act as not within the power of the Congress.

I make that preliminary statement so as to clear the minds of the members of the committee that my argument on the constitutionality has anything to do with my views as to the merits or nonmerits of a poll tax.

Before I go into any questions of detail, I should like to clear away a few of what I might call the debris which has rather clogged and interfered with the real questions at issue which I find in previous hearings. There has been a great deal of talk and argument, so far as I can make out, from the witnesses about the question whether the right to vote for Congress is or is not a Federal right secured by the Constitution. Well, I didn't suppose there was the slightest doubt that it was a right secured by the Constitution. The proponents of this bill have devoted much time to what they call the *Classic Case* two years ago to support that proposition. Why, the Supreme Court has held that for 40, 50 years, that the right to vote for Congressmen was a Federal right secured by the Constitution but the question here is: The right of whom to vote for Congressman? That is the issue here, not whether the right exists; of course it exists. The Constitution created the office of Congressman, a Member of the House. It prescribed when they should be elected. It prescribed who should elect them. So it must be a Federal right secured by the Constitution; but the question is, not whether it is a Federal right, but to whom is the right given?

There is another phrase wh ch has been very loosely used all through the hearings in 1941 and 1942. I find in briefs and all through the hearings references to "Federal suffrage," and to the "rights of national citizenship." I was surprised to find a brief, signed by the dean of the Law School of Nebraska, I think, and concurred in by a group of law professors from Yale, Columbia, and Wisconsin, in which they referred constantly to the "rights of the citizens to vote." Then in their brief they speak later of the "right of Congress to prohibit the States from unduly restricting the rights of natio al citizenship." Later on they speak of the imposition by the State of proper qualifications for voting "which do not abridge the rights of national citizenship" and they refer later to "protecting the rights of national citizenship." (See testimony in 1941 and 1942, pp. 35–52.)

Now, that, of course, is an entire misapprehension. There is no right of national citizenship to vote. There were many citizens of the United States who could not vote in the past and who cannot vote today. A woman was a citizen of the United States. She possessed national citizenship—but she could not vote until 1920; and this idea that "national citizenship" confers a right to vote for Congress is, of course, entirely erroneous. The right to vote for Members of Congress is given only to such United States citizens as possess the qualifications for voting in the States for the most numerous branch of the legislature. That is the portion of United States citizens—that is the class of United States citizens—who can vote; but there is no right to vote vested in citizens of the United States in general; so that the issue is clogged and beclouded by using such expressions here as are used in this brief of these law professors.

With those preliminary very fundamental remarks about this right to vote for Members of Congress, I now want to take up a phase which is equally fundamental. I am not going to go into the details of the Federal Convention of 1787, what they said and what they did not say. I am not going to go into the details of discussions of recent cases in the Supreme Court. Those have been discussed at great length and, I feel, at unnecessary length in the testimony of some of the previous witnesses.

But I am going to take up now the question in detail of what this section 2 of article I of the Constitution does and does not do. First, at the risk of going perhaps farther than is necessary with gentlemen of your distinction and legal knowledge, I am going to impress upon you once again, what article X of the Bill of Rights provides, the tenth amendment. We must not lose sight of that for an instant, in trying to ascertain what the section of the Constitution now involved really means. Article X says:

> The powers not delegated to the United States nor prohibited by it to the States are reserved to the States respectively or to the people.

Now, what does this article X actually do? What is its function and what is its content?

In arriving at this method of disposing of the question of the right to vote in the Federal Convention of 1787, there was a three-fold contest. The contest was between those members who wished a uniform qualification for electors (freehold property or otherwise) to be prescribed in the Constitution itself; there was another group of delegates who wished the power to prescribe to be vested in Congress, and there was still a third group who wished the Constitution to prescribe qualifications—not uniform qualifications but qualifications such as the respective States prescribed for their own people.

It was the last group who prevailed, and after 2 days of active debate, they left the Constitution in this respect as it now stands in (and I must trespass upon your patience by even reading again) this much-read section—section 2 of article I:

> The House of Representatives shall be composed of Members chosen every second year by the people of the several States and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

You notice that that is not a grant of power specifically to the Congress of the United States. In fact, it is not a grant of power to anyone. It is a requirement of the Constitution for the formation of the new government. The first part of it is a requirement that the people of the several States shall choose Members of the House of Representatives every second year. That was no relinquishment or delegation of power from the States. That was a constituent part of the formation of the new government and was a command to the States to elect their Members of Congress every second year. That was a command. It was neither a delegation of power nor was it a prohibition. It was a command and is so referred to in the recent cases in the Supreme Court.

The second thing that section 2 did was: It vested a right in the electors in each State who have the qualifications requisite for electors of the most numerous branch of the State legislature—a right in those persons in the State and those only who were entitled to vote for Members of Congress. That was not a delegation of power by the

State because the State never had the power to vote, the State inhabitants never had that power to vote for Members of Congress because there were no such things. That was a direct provision in the establishment of the new government and it did vest a right, but it vested a right in only certain people to vote for Members of Congress.

Now, the third thing that that section 2 contains is this: It contains undoubtedly an implied prohibition on the States against fixing for electors of the Members of Congress and different requirements for suffrage from those which they fixed for the electors of their own most numerous branch of their legislature, i. e., any qualifications which were not those requisite for to render an inhabitant of their own State eligible to vote.

Let me repeat that. There is undoubtedly an implied prohibition that the States cannot establish qualifications for the electors of members of their own legislature which shall be different from those which they establish for electors of Members of Congress. That is neither a delegation nor a grant of power; that is an implied restriction, undoubtedly.

Now, is there in that section 2 any grant of power whatever? Not specifically, of course. I suppose there is, under the necessary and proper clause of section 8 of article I, an implied power to Congress to do certain things, but what is the extent of those implied powers? It is to make all laws which shall be necessary and proper "for carrying into execution" the above provisions of article I, section 2.

What are the provisions? I go back again. First, Congress undoubtedly has power to legislate so as to see to it that the States do elect Members of Congress every second year. Congress undoubtedly has the power to protect the right which the Constitution vested in such persons in the States as had the qualifications requisite to vote for members of the State legislature. Congress undoubtedly has that power; and thinks Congress has, under the necessary and proper clause, power to legislate so as to see that the States make the same provisions for qualifications of electors of Members of Congress as they do for electors of their own legislature.

Those are the only three things that can be done under article I, section 2, and those are the only three things on which Congress can act under the necessary and proper clause, and "carry into execution" under that clause.

Senator CONNALLY. Would it interrupt you if I asked you a question right there?

Mr. WARREN. No.

Senator CONNALLY. Is it your view or contention that in article I, section 2, where it says they shall elect Congressmen and the electors shall possess the same qualifications as the electors for the most numerous branch of the State legislature, is that a constitutional fixation by the Federal Government of the absolute requirements to participate in the Congressional election?

Mr. WARREN. I will say so. For those who are qualified.

Senator CONNALLY. That is what I mean. In other words, is it or not a fixation by the Federal Government of the qualifications of a man who wants to vote for Congressman and does it not become a Federal requirement that he must possess these qualifications before he can vote?

Mr. WARREN. Yes, sir; it is a Federal right.

Senator HATCH. The point he just brought out was what I was going to ask: Whether he meant the Constitution in this section does actually prescribe and fix the qualifications of voters.

Mr. WARREN. I haven't any doubt it does.

Senator HATCH. And that qualification is, of course, the same qualification that applies to the State legislature?

Mr. WARREN. Yes.

Senator HATCH. Following up that point, if that be true and the Constitution has actually fixed the qualifications, then any law that would either add to or take from the qualifications of the Constitution would violate that section of the Constitution?

Mr. WARREN. Not necessarily the qualifications as they existed in 1787.

Senator HATCH. The qualifications fixed by the Constitution, you say, are the same qualifications that the State fixes for its own representatives?

Mr. WARREN. Yes.

Senator HATCH. Now, if the State has a law, a poll-tax law, we will say, as a requirement for voting for State representatives and Congress would attempt to abrogate that, would it not, in effect, change that section of article I?

Mr. WARREN. I do not think so. I think that section refers to any qualifications that the States might fix for their own members of the legislature. No one would claim——

Senator HATCH. I don't believe you get my point.

Mr. WARREN (continuing). No one would claim, of course, that the qualifications were fixed as of the date 1787.

Senator CONNALLY. He did not mean that. I think you misunderstood him, if I may interpret it. If the Federal Government lays down the qualifications which require the same qualifications to vote for the State legislature, then any Federal legislation that would modify that would be in violation of that clause of the Constitution?

Senator HATCH. Yes.

Senator CONNALLY. That was his point. I think he was in entire agreement with you.

Mr. WARREN. Let me change one word, Senator. You say "If the Federal Government lays down."

Senator CONNALLY. When I said "the Government," I meant the "Federal Constitution."

Senator DANAHER. I would like to ask you a question if I may, sir. A moment or two ago you said, sir, that Congress may exercise the power of seeing to it that the State conducted an election every second year for Members of the House of Representatives.

Mr. WARREN. I said I thought that probably was within their powers under the necessary and proper clause, yes.

Senator DANAHER. Have you given any thought as to how Congress would cause the State to call such an election?

Mr. WARREN. No; that is beyond the present question, as to how Congress could act. I said it probably had the power to see that that portion of the section was carried into execution. How, is another matter. That is not within the purview of the present bill.

Senator DANAHER. One other point. It seems to me in the light of one of your comments on the power that should be exercised that article I of section 2 does not say a State shall hold an election, it uses the word "chosen"

Mr. WARREN. Yes.

Senator DANAHER. And it may make a very real difference in the manner of choice.

Senator CONNALLY. But when it says "electors," that is the implication.

Mr. WARREN. It is the implication, I should say, but I will not go into that because that is a little beyond the purview of my argument, and I was trying, at present, to establish what I consider the limits of the necessary and proper clause as applied to this section.

Senator MURDOCK. Mr. Chairman, I have one question which I hope will be a brief question.

Judge Warren, do you attach any significance to the fact that in section 2 of article I the Constitution uses this language: "chosen every second year by the people." It seems to me that they could have used in place of the word "people," "chosen every second year by the legislators of the several States and the electors in each State shall have certain qualifications."

To me, the fact that the Constitution uses the word "people" is significant and I just wondered if you wanted to comment on that at all.

Mr. WARREN. I suppose that they were synonymous. If a person is chosen by the people he is the person who is elected by the people. I suppose that the choice by the people meant the choice by electors.

Senator MURDOCK. I don't mean to make any distinction between "choosing" and "electing" but it seems to me that the use of the word "people" there means something and that when we find a condition as we find it today in some States, at least, where half of the people are disfranchised, that it probably would be a violation.

Mr. WARREN. I will take that up a little later in discussing what happened in connection with the fourteenth amendment. That argument, of course, was made by a few selected Senators—only one as I recall—who claimed that universal suffrage was prescribed by the Constitution. Of course, the matter did not get very much further than a similar argument on that subject in connection with the fourteenth and fifteenth amendments—but I will take that up, later, I hope.

Now, going a little further, section 2, of course, contains no power, specifically, of Congress to prescribe to the States who they shall qualify to vote for the members of their State legislatures and you have got to find such a power implied if anywhere under the necessary and proper clause. Let us see what the right of the State to prescribe the qualifications, the requirements for voting for its own legislature were when this section was under discussion and when it was adopted by the convention and when it was adopted by the States.

Before 1787, the States had absolutely full and unlimited power to lay down any requirements which the people of the States, through the constitutions or legislatures of the States in their absolute discretion and judgment, desired in order to qualify anyone of their inhabitants to vote for members of the most numerous branch of the legislature.

There was no limitation whatsoever. The State had the power, either in its constitution or in its legislature as the case might be, to say to whom it desired to grant the vote for members of the legislature or from whom it desired to withhold the right, and when the people of the State had spoken in their constitution as to who should

have the right to vote for members of the legislature, of course that was the last word.

You cannot get behind the people; and when the Convention of 1787 met, the people of nine States had spoken in their own States and fixed by their own constitutions the qualifications of those who should vote for members of their own legislature.

How could the Federal Convention get behind that action of the people of the States through their own constitutions? They did not attempt to meddle with the constitutions of the States in any explicit powers given in article I section 2 and I can see no implied power under the necessary and proper clause which gave to the Congress the right to say to the people of the State who had already before devised and established their own constitutions, to say to the people of a State, "You shall not have the right to grant or to deny the right to vote for your own legislatures." Imagine that proposition put up to the members of the Federal Convention, that they were embodying in section 2, a denial to a State of its right through its own State constitution to establish the requirement of a State voter to vote for a member of a State legislature.

Why, it seems to me inconceivable, when you think of the jealousies of the States at that time and the extreme difficulty with which they were relinquishing any powers—and here they were not relinquishing specifically the power to qualify electors for the members of their own legislature. It is inconceivable that you can find an implied power under the necessary and proper clause to do that thing, to interfere with the sovereign right of the people to establish in their own constitution the right to vote for members of their own legislature.

In addition to that, of course, among the members of the Convention, if any such proposition as that had been advanced it certainly cannot be found in any of the debates whatsoever as they were recorded by James Madison or King or Yates or Lansing or any of them. And how unlikely it was that it would be advanced.

The members of that Convention had before them the actual restrictions which their State constitutions had put on the right of their State inhabitants to vote for members of the most numerous branch of their legislature. They had before their eyes the fact that New Hampshire, in 1784, had a requirement for the payment of a poll tax. They had before them that in Massachusetts, in 1780, its constitution required the possession of a freehold. They had the constitution of 1777 of New York, which required that a man should be either a freeholder or a taxpayer of New York or Albany. They had the constitution of New Jersey of 1776, which required that a man should possess an estate of £50. They had the constitution of Pennsylvania of 1776, that a voter for the legislature should be a taxpayer. They had the constitution of Maryland, which required that a voter for the State legislature should be a freeholder of 50 acres or the possessor of £50. They had the constitution of North Carolina of 1776, that he should be a freeholder or a taxpayer, and so on. They had South Carolina and Georgia, which had similar requirements for voting in their State constitutions. The full provisions for voting in the States may be found in convenient tabular form in the appendix to my testimony. It is reproduced from the very valuable book, The Constitutional History of the American People, 1776–1850, by Francis Newton Thorpe (Harper Bros., N. Y., vol. I, pp. 93–971).

In addition to that, they had the fact that acting under these constitutions, several of the States had also statutes prescribing certain qualifications which were allowed by the legislatures. They had all that before them, and yet it is asked now, "Why didn't they describe what they meant by 'qualifications'? Why wasn't there some debate on the use of that term?"

Answer is, of course, that every delegate from every State knew what his State constitution meant by "qualifications" or what his State legislature meant by "qualifications" and they certainly were not giving power to this new Government to define what their own State constitutions meant or to define what the State legislatures meant.

That was a matter for the State exclusively. No legislature can define the meaning of a word in its constitution, no one can define except the people of the State or the State judiciary, as to everything in connection with the construction and interpretation of section 2. There is an absolute absence of any right granted to Congress to decide or define what a State by its constitution or legislature could demand of one of its inhabitants in order to qualify him to vote for a State legislature.

The absence of anything of that kind shows clearly to my mind that the members of the Federal Convention never had any idea that they were giving any power to Congress to interfere with a State constitution or the State legislature.

Senator MURDOCK. May I ask a question?

The CHAIRMAN. Senator Murdock.

Senator MURDOCK. If I have followed the judge's argument, it is this: That if Congress were in a position to say that a qualification fixed by a State statute or by the constitution of a State is unconstitutional, it would be exercising judicial power in the interpretation of a State law or a State constitution, and that the Congress has no such judicial power. Have I followed you correctly?

Mr. WARREN. Yes, sir.

Senator MURDOCK. I might say that that same suggestion was made a few days ago after the previous hearing by Senator McFarland of Arizona. That was the first time that I had heard it made until you made it this morning.

Mr. WARREN. Yes; I am going to come to that a little later but I am glad to answer that question now. At this point, perhaps I will just throw in a suggestion analogous to that.

Not only is it not within the power of Congress to interpret the legal meaning of that clause, but it must also be true, if one thinks of it a little more carefully than some statements that I have seen in the record would indicate—it must also be absolutely true that if you cannot interpret a clause of the Constitution through the exercise of congressional power, you certainly cannot insert something into the section. I notice—and this is said with all due deference because I suppose we are all entitled to differ, even with the Senators of the United States—I notice that Senator Pepper in his argument says that "qualifications" means "reasonable qualifications." Of course, if Congress can insert the word "reasonable," it can insert the words "except poll-tax requirements" or any other words that it desires. The idea that Congress has the power not only to define the meaning of a word in the Constitution but to insert some other

words that do not exist there—to my mind, if that is the congressional power—I see no limit to the exercise of it, none whatever.

Senator OVERTON. May I ask a question?

The CHAIRMAN. Senator Overton.

Senator OVERTON. You made it very clear that section 2 of article I declares that the qualifications of the electors for the House of Representatives shall be the same qualifications as for electors for the most numerous branch of the State legislature. If the two go hand in hand, you cannot have a set of qualifications for electors for the most numerous branch of the State legislatures and another set of qualifications for electors of the House of Representatives, so if Congress should enact a bill that would prohibit the prepayment of a poll tax as a qualification to vote, it would go further than merely to prescribe the qualifications of electors of the House of Representatives, it would be prohibiting the State from prescribing the qualifications for the electors of the most numerous branch of the State legislature. Isn't that true?

Mr. WARREN. Unquestionably; and if it passed you would have to have at every polling booth two separate registers of electors.

Senator OVERTON. No; they would not. I beg your pardon, but you do not grasp my point. If the Congress of the United States can constitutionally prescribe any qualifications or can prohibit any qualifications for the House of Representatives, then the State must also make the same requirement with reference to the qualifications of electors for their legislature.

Mr. WARREN. I don't think Congress has the power to require the latter.

Senator OVERTON. I agree with you.

Mr. WARREN. And, therefore, I don't think it has the power to prescribe the former. I think unquestionably the two go hand in hand. If it has the power to do the former, it may have the power to do the latter. I don't suppose anybody in his wildest dreams would suppose that it had the power to restrict the States in prescribing qualifications for their own voters for their own Legislatures.

Senator OVERTON. Just to repeat my thought again. I am reading from the Constitution:

> The electors in each State shall have the qualifications requisite to electors for the most numerous branch of the legislature—

so if Congress does declare that the prepayment of a poll tax shall not be a requirement then it prohibits the State from fixing the prepayment of a poll tax as a qualification for electors of their own State legislature.

Mr. WARREN. Yes.

Senator HATCH. Judge Warren, while you are on the discussion of Senator Pepper, I am sure you are going to come to this, but it is a question I do want your answer to.

I do not think that the main contention of those who favor the legislation is that it must be a reasonable qualification, but rather, as I understand it, the contention is that the State cannot, under the guise of fixing a qualification, fix something which is not either in law or in fact a qualification and if it does, then the Congress is charged with a duty of enacting legislation prohibiting the fixing of whatever it might be which is not actually a qualification.

Mr. WARREN. Well, that is giving the Congress the power to define the word "qualification," which is purely a judicial function and power. To define a word, any word, in the Constitution of the United States is purely for the court. Congress can no more define a word than it can insert a word.

That is my contention, but Senator Pepper contended in the hearings in 1941 and 1942 that, "in prescribing the qualifications of a voter, they must be reasonable qualifications, subject to the rules of reasonableness." (See testimony, pp. 23, 24, 25.) Of course, that is simply inserting a word into this section 2 of article I of the Constitution and if the Congress has power to insert one word it has power to insert others.

Senator CONNALLY. On that point, may I ask you one question, I don't want to interfere. If Congress should have the power to say what a reasonable qualification was, would it not amount to turning over to the Federal Government the whole question of qualifications?

Mr. WARREN. Of course.

Senator CONNALLY. And instead of leaving it to the State, as we think the Constitution did, if you grant Congress had supervision and can oversee what the State does, then you are turning over to the Federal Government the absolute control of suffrage.

Mr. WARREN. In other words, it is defining what a State in its own State or in its own constitution can do in qualifying its voters for its own legislature.

Senator CONNALLY. Absolutely.

Mr. WARREN. I now want to go into a historical discussion because it is a very valuable illumination on this question. So far as I have been able to ascertain, from 1788 down to 1865, there is no statement of any court, in any law book, in any legislative debate, or by any statesman that Congress had any such power to regulate suffrage in the States. Take the most extreme Federalist writer, for I suppose the man who made the largest claims for extension of Federal power was Mr. Justice Storey.

Mr. Justice Storey, in his Commentaries, written in 1833, describes this section—and discusses it very slightly because he says that there was no question that the States retained the full power over their own suffrage and, therefore, over the suffrage of their electors for Members of Congress. Storey's Commentaries (1933) states (vol. I, sec. 820), after treating at length in a number of sections, the subject of Congressional power under article I, section 4, to regulate the "times, places and manner" of holding elections for Senators and Representatives—

> There is no pretense to say that the power in the National Government can be used so as to exclude any State from its share in the representation in Congress. Nor can it be said with correctness that Congress can, in any way, alter the right or qualification of voters.

That was the situation down to the year 1865.

Then arose that very heated condition growing out of the situation at the end of the war and if there was ever a time in our whole history, and especially in our whole legislative history, if there was ever a time that a claim should have been made that the United States Congress had any power to regulate the question of suffrage in the States, that claim would have been made during the debates over the civil-rights bill of 1866 and the debates on the fourteenth amendment in 1866. I want to read you, at the risk of trespassing a little

on your patience and your time, the very emphatic statements made by the Senators at that time, not only the Senators of the North and East but the Senators of the West—of course, there were no Senators from the South. With the exception of one Senator, there was not a single Senator on the floor of the Senate who claimed or contended for 1 minute that the States did not have the full control of the suffrage.

The only exception to that statement was Senator Charles Sumner, of Massachusetts, and even he admitted that the State of Massachusetts had complete power to regulate suffrage with one exception; he did not think they had the power to deny suffrage to the Negro, but, with that exception—and how he worked out that exception is rather a mystery except that Senator Sumner used to insert the Negro into every bill that came along—but with that exception there was not a Senator who denied the full power of the State to regulate suffrage.

Let me recall to you who were the authors of that fourteenth amendment. When I said every Senator, North, West, and East, I meant to include every Senator, Republican and Democratic. Who were the authors of that fourteenth amendment?

First, it was constructed by a joint committee of 15 of the Senate and House, the Senate chairman of which was William Pitt Fessenden, of Maine, later President Lincoln's Secretary of the Treasury. The senior member and the man who took Senator Fessenden's place on the floor of the Senate when Fessenden was later ill was Jacob M. Howard, of Michigan, and then followed John Harris, of New York; James W. Grimes of Iowa; Reverdy Johnson, of Maryland; and George H. Williams, of Oregon.

And the members of that joint committee on the House side were Roscoe Conkling, of New York; George M. Boutwell, of Massachusetts; Henry T. Blow, of Missouri; John A. Bingham, of Ohio, the author of the first section of the amendment; Justin S. Morrill, of Vermont; E. B. Washburne, of Illinois; and two others—I forget where they came from. I think Grider, of Kentucky, was one of the lone two Democrats on the committee of the House. That was a very distinguished committee, who gave a great deal of thought to this amendment and, therefore, their views at this excited period when, if ever, the most extreme claims of Federal power would have been made, should give you some pause in considering this question.

This amendment was considered twice. The first two sections were considered separately and then as separate resolutions for separate amendments, and then they were later joined together and made articles of one amendment, the fourteenth amendment, as it now appears.

When what is now the first section of the fourteenth amendment was reported to the House, it was drafted by John A. Bingham, a Republican Member of the House from Ohio and in answering it on May 10, Mr. Bingham made these statements (this is on page 2542 in the Congressional Globe if anyone wants to look it up.) Mr. Bingham said:

> This amendment takes from no State any right that ever pertained to it. The amendment does not give, as the section shows, the power to Congress of regulating suffrage in the several States.

and in the second section—that was the section, you remember, that reduced the representation of the States in case they denied to any person the right of suffrage—Bingham said:

> The second section excludes the conclusion that by the first section suffrage is subjected to congressional law.

In the Senate, this first section was discussed by Senator Howard, who was heading the committee in the absence of Senator Fessenden; and he states (May 23, p. 3165 et. seq.):

> The first section of the proposed amendment does not give to either of these classes the privilege of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as a result of positive local law.

As to section 2 (on page 2766), Howard said:

> This section does not recognize the authority of the United States over the question of suffrage in the several States at all. Nor does it recognize much less secure the right of suffrage to the colored race. It leaves the right to regulate the elective franchise still with the States and does not meddle with that right.

In closing the debate, June 8, and just before the joint resolution was passed upon by the Senate, Senator Howard said (p. 3039):

> We know very well that the States retain the power which they have always possessed of regulating the right of suffrage. It is the theory of the Constitution. That right has never been taken from them; no endeavor has ever been made to take it from them; and the theory of this whole amendment is to leave the power of regulating the suffrage with the people or legislatures of the States and not to assume to regulate it by any clause of the Constitution of the United States.

Senator DANAHER. Mr. Chairman, may I ask a question at this point?

The CHAIRMAN. Senator Danaher.

Senator DANAHER. Judge Warren, at the time that article I, section 2, was adopted as part of the Constitution, there was also a provision which read:

> Representatives and direct taxes shall be apportioned among the several States which may be included within this Union according to their respective numbers which shall be determined by adding to the whole number of free persons including those bound to service for a term of years and excluding Indians not taxed, three-fifths of all other persons.

Obviously, that recognizes a distinction between what were known then as free persons and others?

Mr. WARREN. I did not catch that.

Senator DAHANER. Obviously recognizing a distinction between those who were then known as free persons and all others.

Mr. WARREN. Yes.

Senator DANAHER. That section was repealed by section 2 of article XIV.

Mr. WARREN. Yes.

Senator DANAHER. And amendment XIV says:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed, but when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State or the members of the legislature thereof is denied to any of the male inhabitants of such a State being twenty-one years of age and citizens of the United States or in any way abridged except for participation in rebellion and other crime, the basis of repre-

sentation therein shall be reduced in proportion that the number of such male citizens shall bear to the whole number of such male citizens twenty-one years of age in such State.

Do you doubt the power of Congress to enforce that section by appropriate legislation?

Mr. WARREN. It says, in effect, that if the State chose to deny the right to vote to any section of its inhabitants, it should have its representation to that extent lessened.

In fact, that was the whole basis on which that section 2 was finally adopted, that they recognized the right of the State to deny any person the right to vote but they said, "If you deny any such persons the right to vote, then that number of your electors and your representation shall, to that extent and in exactly that same proportion, be reduced."

Senator DANAHER. Do you not agree; sir, that by the fourteenth amendment, section 2, we specified qualifications as a basis upon which abridgment of apportionment could be predicated?

Mr. WARREN. No; I do not see that section 2 states anything about qualifications.

Senator DANAHER. It says they must be 21 years of age. Is that not a qualification?

Mr. WARREN. It says:

denied to any person being twenty-one years of age and citizens of the United States.

Senator DANAHER. Are those not qualifications, Judge Warren?

Mr. WARREN. No.

Senator DANAHER. What are they?

Mr. WARREN. A woman is a citizen of the United States; a minor is a citizen of the United States; a pauper is a citizen of the United States. There are plenty of citizens of the United States who have not the right to vote in a State, under the State constitutions. It has nothing to do with the question of being a citizen of the United States.

Senator DANAHER. Would we have the power, in your judgment, to deny representation—let us take, for example, the State of Texas—by reducing the numbers of representatives in the House of Representatives on the basis that the right to vote is abridged as against citizens who are 21 years of age?

Mr. WARREN. Yes. Certainly you have got it specifically granted to you, the right to reduce representation. That is specifically granted by section 2 of the fourteenth amendment.

Senator DANAHER. So that if we were to amend this bill to say that if there be, in any State, a requirement that a poll tax be paid as a prerequisite for the privilege of voting and the right of any citizen being 21 years of age is thus abridged, all numbers of such persons so denied the right to vote shall be excluded from the basis of apportionment of representatives allotted to that State?

Mr. WARREN. Unquestionably.

Senator DANAHER. It may be a good answer to this whole bill.

Mr. WARREN. Unquestionably. I am not discussing what Congress could do under some other power than that in section 2 of article I of the original Constitution. I hope you will not confine any illustration to the State of Texas because I notice that the Senator from the State of Texas is temporarily absent from the room.

Senator MURDOCK. This argument and the same discussion as the colloquy between Senator Danaher and yourself happened before the Judiciary Committee of the House when I was a member of that. The argument was made there that the second section of amendment 14 really contemplated that the States may abridge the right of certain people to vote but that if such abridgment or denial did take place that Congress had a remedy by reducing the number of Representatives.

Mr. WARREN. And that was the only remedy at that time until the fifteenth amendment was passed. The fifteenth amendment was passed in order to get away from doing that thing and it was made a part of the Constitution that the Negro should not be excluded from voting.

Senator MURDOCK. You take tke position, as I understand you, that under amendment 14, section 2, the exclusive remedy of Congress to meet such an abridgment by a State is the reduction of Representatives?

Mr. WARREN. And it is so stated. I was just going to read that.

Senator MURDOCK. Of course, the people who sponsor this anti-poll-tax law take the position that that is not the only remedy, that it is not exclusive.

Mr. WARREN. I would like now to pursue the statements made by the Senators who constructed the amendment because they are certainly very powerful. I think that the last quotation was from Senator Howard who reported the amendment to the Senate.

(I think that Senator Danaher may be interested in this.) When they first took up the second section of the fourteenth amendment, Senator Fessenden, who was then recovered from a slight illness and was, as I say, the chairman of this joint committee, made this statement. He was controverting at the time, I think, Senator Sumner. On February 7, 1866, he said (p. 704):

> The power exists now at the present time in all these States to make just such class or caste distinctions as they please—

Senator Sumner was claiming it was a class distinction to exclude the Negro:

> The power exists now at the present time in all these States to make just such class or caste distinctions as they please. The Constitution does not limit them The Constitution, in terms, gives us no power. It leaves to the States, as everybody knows, the perfect authority to regulate this matter of suffrage to suit themselves.

Later in his speech, he describes what the second section means in requiring the reduction and he said (p. 705):

> It says to all the people of the United States you shall be represented in Congress, but, as we fear you may be governed by narrow views, as we fear you will do injustice to a portion of the people under your charge * * * we say to you that you shall not have political power any further than you show by your actions that you are disposed to let your charges participate in it.

Senator Reverdy Johnson, of Maryland, a very distinguished—one of the most distinguished lawyers at the Supreme Court bar—and who was the lone Senate Democrat on this joint committee of 15 in the Senate, speaking of the fact that at that time this question of suffrage of the Negro was not a Southern question entirely because of the fact that of the States of the North and the East at that time there were

only 6 who admitted the Negro to the right of suffrage for members of their own legislature. In other words, that the free Negro was not admitted to the right of suffrage in any of the States of the North and East except 6, and Senator Johnson said, in pursuing that line of thought as to the complete power of the States at that time over the whole subject (p. 765):

> I suppose that even the honorable Member from Massachusetts [Senator Sumner] will not deny that it was for Massachusetts to regulate her suffrage before 1789, and if it was, she has the power still unless she has agreed to part with it by devolving it upon the General Government. Is there a word in the Constitution that intimates such a purpose? Who at that time, in 1787, denied that the State was clothed with the power of prescribing the qualifications for the most numerous branch of the State legislature? * * * The State and nobody else.

He then cited Federalist, No. 54:

> The right of choosing the allotted number in each State is to be exercised by such part of the inhabitants as the State itself may designate. Words could not have been adopted more obviously leading to the conclusion that in the opinion of the writers of the Federalist, the States were to have the sole right of regulating the suffrage.

Then, further down, he says:

> There is nothing innate in the right of suffrage. It depends wholly upon governmental regulation.

There was one other Democratic Senator not on the joint committee, but of considerable distinction, and I am citing these to show you that there was no difference of opinion between such prominent Republican Senators as Howard and Fessenden and the Democratic Senators, Reverdy Johnson and Senator Hendricks of Indiana. Senator Hendricks said (p. 880):

> I ask the Senators the question: Have the States, under the Constitution, the right to control the elective franchise? Does any Senator question that? The Senator from Massachusetts does. He thinks that Congress may control the right of suffrage in the State, but it has not been a question of dispute whether the State had control of elective franchise. It is absolute and perfect.

Then Senator Sumner got up and he denied the right of a State to deny the Negro suffrage, but he went on to say that the State had entire control over the right of suffrage and could deny it by reason of condition of age, residence, character, education, property, and the payment of taxes, but he claimed it could not be applicable to color. So you see, even Senator Sumner would have denied the right of Congress to pass the present bill.

Coming along in the debate, we find Senator Wilson, who was the colleague of Senator Sumner from Massachusetts, said (p. 1255):

> The men who framed the Constitution made those State constitutions * * * they well knew what the qualifications were. Every State constitution provides for electors, prescribes the qualification for suffrage. The laws of the States provided for qualifications of electors. Every State, from the adoption of the State constitution to this hour, has claimed the authority and exercised it to settle the questions pertaining to suffrage. They never supposed that the Federal Government had the power to change it. They never gave that power and they never intended to give that power.

That is the statement of Senator Wilson, afterwards Vice President of the United States.

Then in closing the early debate on that section, Senator Fessenden, who was chairman of the joint committee that drafted it, made this statement (p. 1278):

> If I understand the Constitution at all, it has always been considered that the clause which I have read—

that is, the second section of article I of the Constitution—

> acknowledged the right of the States to regulate the question of suffrage. I do not think it has ever been disputed. * * * The States have a perfect right today and they may exercise it as they see fit to make such rules as suit them with regard to the qualifications of electors.

I won't weary you by any further citations.

When the fourteenth amendment was adopted, you will recall that it was claimed by some Republicans, I think by George H. Boutwell of Massachusetts, who later became Secretary of the Treasury, that the first section denying to the States the power to abridge the privileges and immunities of citizens of the United States—although the contrary had been stated time and time again during the debate on this amendment—it was claimed that that privilege and immunity clause of the citizens of the United States denied to the State the power to restrict the right of suffrage, and when, in 1868, the fifteenth amendment was under consideration, Mr. Boutwell and some others thought it was not necessary to pass the fifteenth amendment in order to give the Negro the right to vote because they said it could be done by a simple act of Congress under the privilege and immunity clause, that is, by an act of Congress enforcing the privilege and immunity clause. That attempt was soon dropped. That bill was debated in the House but it was soon dropped, and the fifteenth amendment was adopted in order to establish the power by the Constitution.

The fifteenth amendment was passed, I think, in 1869. The idea that the privileges and immunities of the citizens of the United States denied in some way the right of the States to control suffrage, that idea prevailed for a number of years until, in 1875, there came along the *Slaughterhouse cases*; and in those cases there was laid down, you remember, for the first time the distinction between the rights of a citizen and a State and the rights of a citizen of the United States, as such, that is, the rights which grew out of some peculiar relation of an inhabitant of a State to the United States Government.

Then, you remember, very shortly after the *Slaughterhouse cases*, there came the case which, in fact, applied the general proposition that there was a distinction between the right of a citizen of a State and the right of a citizen of the United States per se, to the specific right of a woman to vote. That was the case of *Mino* v. *Happerset* (21 Wallace 162). On March 29, 1875, in that case the extent of the distinction between the rights of a citizen of the United States and the rights of a citizen of a State with regard to voting was laid down and explained, and Chief Justice Waite said that the—

> fact that the right of voting could not grow out of citizenship alone was clear when you considered who was a citizen of the United States; everybody born here was a citizen of the United States and, therefore, if voting depended on

citizenship every child, every women, every pauper, every criminal, every person born here would have the right to vote—

and he concluded:

Certainly, if the courts can consider any question settled, this is one. For nearly 90 years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage.

And using those same words here in the year 1943, I should suppose that if any question had been settled in 134 years, it was this question that the States alone possessed the right of control of suffrage.

Senator MURDOCK. Mr. Chairman, may I ask this question?

The CHAIRMAN. Senator Murdock.

Senator MURDOCK. Are you familiar with Public Law 712 of the Seventy-seventh Congress, which was approved September 16, 1942, with reference to soldiers voting?

Mr. WARREN. Yes. I know there was such a law.

Senator MURDOCK. Section 2 reads as follows:

No person in military service at time of war shall be required, as a condition of voting in any election for President, Vice President, electorates for President or Vice President, or for Senator or Member of the House of Representatives, to pay a poll tax or other tax or make any other payment to any State or political subdivision thereof.

I assume, from your statement here, that you would take the position that that section is unconstitutional?

Mr. WARREN. Personally, I should not have had any doubt about it; except for the fact that the war power has received such immense extensions in recent years. Hence I should not now be at all certain as to how far it extended in that direction. Except for the war power, everything that I have said on the present bill, so far would certainly apply. I would have made precisely the same argument if I had appeared before this committee in connection with that bill in 1942, except that I would have frankly stated that I do not know in that respect how far the war power extends. I have about come to the conclusion that all my previous views regarding the extent of power of this Government in time of war must be canceled and, that, at the present moment, I do not know what there is which the Government cannot do if the war makes it necessary.

Now, I take up another branch of my argument. I dislike always, in arguing before a court, for I think it is a very disagreeable thing for the court and I am sure it is for you gentlemen, to cite passages from cases; and yet, tracing this idea that Congress had no power to control the right of suffrage in the State down through the years and decades, I must show how far this statement comes down in decisions by the Supreme Court. I will only cite a few cases to show that it comes down all through the line.

The first case under the legislation that grew out of the fourteenth and fifteenth amendments was not decided by the Supreme Court until 1876. You remember there was a series of statutes purporting to enforce the fourteenth and fifteenth amendments. A large portion of those statutes were declared unconstitutional because of the effort of Congress to apply them directly to acts of individuals instead of to acts of States, but there was the Enforcement Act of May 31, 1870; there was, of course, the Ku Klux Act of April 20, 1870; and there was the Federal Election Act of June 10, 1872, and there was the Civil Rights Act of March 1, 1875; and they all came before the

Supreme Court sooner or later. Under them, many cases involving constitutional rights of citizens arose.

The first case was that of *The United States* v. *Reese* (1876), 92 U. S. 214, decided in 1876. It involved the fifteenth amendment and the enforcement of it against persons who alleged the States to be discriminating in elections against them. The sections of the statute which were sought to be applied were held invalid because they were not appropriate legislation under the fifteenth amendment, but in the course of that case and decision, Chief Justice Waite said that—

> Before the adoption of the fifteenth amendment, it was possible for a State to exclude a man from voting because of his race, color, or otherwise.

He said:

> Before its adoption, this could be done. It was then as much within the power of the State to exclude citizens of the United States from voting on account of race and so forth as it was on account of age, property, or education.

Then came the *Mino* v. *Happiset* decision, which held that a State might exclude women from voting. Then passing down a long list of cases, there is, of course, the statement in the *Ex parte Yarbrough case* in 1884 (110 U. S. 56), a case, I think, that was cited ten or a dozen times in the recent *Classic case* in which Judge Miller said:

> The States, in prescribing the qualification of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for Members of Congress. Nor can they prescribe the qualifications for voters for those eo nomine. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for Members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for Members of Congress.

The CHAIRMAN. Judge Warren, if you desire, in the interest of conserving time, you can incorporate that in the record here as part of the record.

Mr. WARREN. I have only a few other citations. The decision in *Wiley* v. *Sinkler* (179 U. S. 58), in 1900, answers the question, I think, that Senator Murdock asked. In discussing the right to vote for Members of Congress, Judge Gray said:

> They define who are to vote for the popular branch of their own legislature and the Constitution of the United States says the same persons shall vote for Members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for Members of Congress.

I call attention to a statement made in *Pope* v. *Williams* (193 U. S. 621), in 1904, which has some bearing upon one of the contentions made here by the proponents of the present bill. Justice Peckham says:

> A State, so far as the Federal Constitution is concerned, might provide by its own constitution and laws that no one but native-born citizens shall be permitted to vote, as the Federal Constitution does not confer the right of suffrage upon anyone, and the conditions under which that right is to be exercised are matters for the States alone to prescribe, subject to the conditions of the Federal Constitution.

and I want to call to your attention the following words:

> The question whether the conditions prescribed by the State might be regarded by others as reasonable or unreasonable is not a Federal one. * * * The right of a State to legislate upon the subject of the elective franchise as to it may seem good, subject, we believe, to the conditions already stated being as unassailable, we think it plain that the statute in question violates this right.

We come down as late as 1915 to a decision in *Gwinn* v. *United States* (238 U. S. 347). That was the *Oklahoma Constitution case* which arose under the fifteenth amendment; and in it Chief Justice White stated:

> It is true also that the amendment—

that is, the fifteenth amendment—

> does not change, modify, or deprive the States of their full power as to suffrage except, of course, as to the subject with which the amendment deals—

that is the subject of the Negro.

I want to call your attention particularly to a passage in Chief Justice White's decision, in which he points out what was the contention of the Government of the United States at that time, made through its Solicitor General of the United States, Mr. John W. Davis.

> The United States says that State power to provide for suffrage is not disputed although, of course, the authority of the fifteenth amendment and the limit on their power that is insisted on—hence no assertion denying the right of a State to exert judgment and discretion in fixing the qualification of suffrage is advanced.

That is, the Government, through the Attorney General at that time, did not even pretend or contend that the judgment and discretion of the United States in fixing the qualification for suffrage existed.

I am not going to discuss the *Classic case*. It has been discussed, I think, in testimony rather ad nauseam. I had rather supposed—and before this question came up, I read that case a number of times—I had not supposed that the case and its decision had anything whatsoever to do with the question of the right of the State to control suffrage. It was simply concerned with whether a primary election was an election within the meaning of the term "manner" of regulating an election as used in this fourth section of article I of the Constitution. I searched in vain, I searched in vain to find a single word in that decision that has anything whatsoever to do with the question of the right of suffrage. But you gentlemen are quite as capable, and probably more capable than I am, of knowing what that decision decides. I simply say that, so far as I can see, it decides nothing whatsoever pertinent to this question I am now arguing; and I had not supposed that, except for the fact it held that a primary election might be included within the term "election" as used in the Constitution, except for that decision, I had not supposed there was a single proposition or dictum or expression in that case that differed in the slightest from what had been held in case after case for 50 years before it.

I have finished what I had to say.

Senator CONNALLY. I agree with you that the fourteenth amendment does not give any power such as asserted in this bill but there are those that do. There are those who assert that the Constitution gives some power to Congress. But I want to call your attention to the fact in 1917, I believe it was, that in the seventeenth amendment for the popular vote for Senators, they reenacted, so far as the qualifications of Senators are concerned, the same clause as contained in section 2 of article I that—

> The Senate of the United States shall be composed of two Senators from each State elected by the people thereof for 6 years and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors for the most numerous branch of the State legislature.

I wanted to ask you whether or not there were any powers in the fourteenth amendment, if it would not, as far as Senators at least are concerned, be repealed by the subsequent insertion in the Constitution of the seventeenth amendment.

Mr. WARREN. Well, I should not have any doubt about that. I should say that when a word had been used in the original Constitution and at least silently construed, that is, no one ever claimed that the qualifications could not be decided by the States, I should say that a word in the seventeenth amendment meant precisely what it meant in the original Constitution. Whether it had the effect of repealing anything in the fourteenth amendment I do not know. But I have frankly never given any consideration to that, believing so certainly and conclusively and impressively in the statements made by the Senators about the effect of the fourteenth amendment so I cannot see that there is anything relating to the State's right over suffrage to repeal.

Senator CONNALLY. What I meant was this: That since the seventeenth amendment is specific that it deals with a single thing, the qualification of electors for Senators, and the fourteenth amendment having general terms and things of that kind, with the seventeenth amendment being subsequent to the fourteenth amendment, if there was anything in the fourteenth amendment it would certainly have to yield to the seventeenth amendment and even granting the proponents' views, you would have to have two boxes, you would have to have one for Congress and one for Senator and one for State officers, would you not?

Mr. WARREN. I should suppose so but I do not think it is necessary on the basis of my argument.

Senator CONNALLY. Thank you.

Mr. WARREN. Just one minute. I suppose you are going to adjourn very shortly. I had not intended to cover this whole subject, of course, and I understand one of the great contentions of the proponents of this bill is that even if section 2 of article I gives no power, section 4, which authorizes Congress to adopt regulations as to time, place, and manner, gives the power to regulate the suffrage.

Of course, there is not a single decision of the United States courts from one end to the other that even intimates that "manner" of conducting an election includes the qualification of electors. But pass that by. If it does, what was the use of section 2? If the Constitution assumed to fix the qualifications of electors by section 2, why should it then pass section 4 and give Congress the right to change everything which it had already fixed in section 2? In other words, it is impossible that the two sections include the same subject matter, because by section 4, if it be true that "manner" includes fixing qualifications, then Congress has full power to do anything about qualifications and Congress has full power to override section 2. Is it conceivable that, having prescribed the qualifications for voting for Members of Congress in the Constitution itself by section 2, the Federal Convention then proceeded, only a day or two later, to adopt section 4, which, on the present theory, empowered Congress to alter or do away with any or all of the qualifications which the Convention had already established by the Constitution itself in section 2? It cannot be that the Convention was adopting two sections, one of which absolutely nullified the other. That is all I have got to say on that subject. If that argument can be overcome,

and the fact that no decision of the Supreme Court has ever intimated that "manner" included regulation of suffrage, if those two arguments can be overcome, I cannot make them any clearer or more forcible and I am not going to take them up.

I have confined my arguments purely to the meaning and construction and interpretation of section 2 of article I and, as I say, I cannot find in the legislative debates, in the courts, or in the writings of any lawyer, any attempt to assert that the States did not absolutely control the right of suffrage, until the question has arisen within the last few years and been encouraged by what some people think they find in the *Classic case*. If I am able to understand the English language, I cannot find there what they think they find; but I am not going into that because you gentlemen are fully competent to decide what you think the *Classic case* decides.

I wish to thank you gentlemen for your patience.

Senator CONNALLY. Mr. Chairman, I want to request the authority of the committee that the stenographer furnish Judge Warren a copy, at the earlest practical moment, of his remarks here and that he be accorded the privilege of inserting in full any matter that he has or embellishing what he has said to make it a full and complete statement.

The CHAIRMAN. Without objection, it is so ordered, Senator Austin.

Senator AUSTIN. Mr. Chairman, I appreciate the opportunity to listen to Mr. Charles Warren on this subject. It has been a very illuminating discussion.

There is one point which, if he cares to talk on, I would like to hear his views on and that is the use or definition of qualifications in the brief and in many arguments that have appeared in support of this proposal. The assertion appears that the requirement of the payment of a poll tax is not a "qualification" and that it is only a prerequisite or condition and that, therefore, this proposal does not offend the Constitution. Do you care to comment on that subject?

Mr. WARREN. When we go back before the Constitution, a qualification to vote meant whatever the State constitution or the State legislature required of a man in order to make him eligible to vote. Therefore, the "qualifications" which the Constitution speaks of, must mean what it meant in the States and what it meant in the States before 1787, i. e., such conditions, prerequisites or the existence of such other facts or conditions as the States thought it necessary to require before granting to an inhabitant the right to vote. I cannot see how it could possibly mean anything other than that. They were not originating a language. They were adopting the requirements with which they were perfectly familiar, which included the requirement of paying a poll tax; the requirement of possessing so much wealth or so much money and so forth. It was a question for the States exclusively to decide, what they should require of a man before they should render him qualified to vote.

I cannot see it in any other way than that because if that is not so, then you must find a power of Congress to define a word in the Constitution and I look in vain for any such power. That is purely a judicial question. Congress has, as I said at the opening, no more power to define a word in the Constitution than it has to insert a word in the Constitution, in fact, to define a word would, in many cases, be, to insert it. Just as I said, Senator Pepper wanted to prescribe "reasonable qualifications" which is certainly an insertion.

The CHAIRMAN. Senator McFarland?

Senator MCFARLAND. No questions.

The CHAIRMAN. Senator Connally?

Senator CONNALLY. I merely want to express my own appreciation and I am sure all the other members of the committee are grateful to you for this very illuminating and unselfish argument you have made on this subject.

Mr. WARREN. I hope I have cast a few rays of light.

The CHAIRMAN. Senator Murdock?

Senator MURDOCK. I have asked probably too many questions now. I do want to say I have thoroughly enjoyed the discussion.

The CHAIRMAN. Senator Revercomb?

Senator REVERCOMB. No questions.

The CHAIRMAN. Senator Danaher?

Senator DANAHER. I think you might inadvertently have been led into error in reply to Senator Connally's question. Surely you do not mean that the seventeenth amendment repealed the fourteenth amendment?

Mr. WARREN. Certainly not.

Senator CONNALLY. I did not make that qualification. It was as to suffrage only that the seventeenth amendment referred to.

Mr. WARREN. My answer was that I did not agree that the fourteenth amendment had anything to do with suffrage at all so I did not think the seventeenth would repeal it but if the fourteenth amendment did have anything to do with State rights over suffrage, then I should say the Senator was correct in thinking that the seventeenth amendment might have repealed it. I would not make that too definite, because, in a constitutional amendment, I am rather inclined to think that if you are going to repeal some previous constitutional amendment, you had better make it specific.

Senator DANAHER. One other question. Surely it is a fact that apportionment is still based upon the fourteenth amendment, section 2?

Mr. WARREN. Certainly. Apportionment of Representatives, you mean?

Senator DANAHER. Yes; and we have a census every 10 years for the purpose of counting the number of persons within the State upon which apportionment shall be predicated.

Mr. WARREN. Certainly.

Senator DANAHER. And when we passed the fourteenth amendment, we certainly repealed explicitly that portion of article I of the original Constitution which had prescribed a distinction between free persons and all others who were to be counted for apportionment purposes?

Mr. WARREN. Precisely. It is precisely the same subject—just as was the repeal of the prohibition amendment. You probably could not have repealed that amendment by implication merely.

Senator DANAHER. I have enjoyed your discussion very much and I have appreciated your contribution so greatly I would like to ask your opinion on a hypothetical point.

Mr. WARREN. My opinion on hypothetical points is usually not very valuable.

Senator DANAHER. It is at least as valuable as the expert witness and I would like to have you comment, if you will, on this assumption:

Assume there were before us a bill which read as follows:

Whenever any State, municipality, or other government or governmental subdivision, or any person, whether or not acting under color of authority of the laws of any State or subdivision thereof, shall abridge in any way, the right of any citizen, being 21 years of age, to vote in any primary or election for the choice of electors for President and Vice President of the United States, Representative in Congress, the executive and judicial officers of a State, or the members of the legislature thereof—

those words following exactly article XIV, section 2—

the number of Representatives from any such State wherein such abridgement exists, shall be reduced in the ratio that the number of such citizens whose right so to vote shall be abridged bears to the whole number of persons in any such State.

Mr. WARREN. I think I have explained to you what I believed section 2 of the fourteenth amendment permitted Congress to do. As to any particular bill, I must answer what I have several times answered to a similar question before the Supreme Court when they have asked me: Would you say that this law applies to such-and-such and such-and-such? I have invariably had to answer that I have enough difficulty in arguing this one case and I certainly will argue the other cases when I come to them.

The CHAIRMAN. Thank you very much, Judge Warren.

The committee is adjourned.

(Whereupon, at 12 o'clock m., the committee adjourned subject to call of the Chair.)

APPENDIX

[Extracts from The Constitutional History of the American People, 1776–1850, by Francis Newton Thorpe (Harper Bros., New York), vol. I, pp. 93–971.]

Qualifications of electors prescribed by the Constitutions, 1776–1800

State	Constitution	Age	Residence	Property	Taxation	Religion [1]	Sex	Race	Native or naturalized
New Hampshire	1784	21	Town	Having town privileges, freehold.	Poll tax		Male		
	1792	21	do	Freehold			do		
Vermont	1777	21	1 year in State				do		Foreigner after 1 year's residence.
	1786	21	do				do		Do.
	1793	21	do				do		Do.
Massachusetts	1780	21	1 year in town	Freehold of annual income of £3, or estate of £60.			do		
New York	1777	21	6 months in county	Freehold of £20 or paying rent of 40s. Freehold of £100 to vote for State senator.	Taxpayer, or freeman of Albany or New York City.				
New Jersey	1776	21	12 months in county	Estate of £50			do		
Pennsylvania	1776	21	1 year in State		Taxpayer		Male or female.	White or black.	
	1790	21	do		State or county tax		Male		
Delaware	1776 [2]						do		
	1792	21	2 years in State		State or county tax		Male	White	
Maryland	1776	21	1 year in county	Freehold of 50 acres or property of £30.			do		
Virginia	1776 [2]								
North Carolina	1776	21	12 months in county	Freehold in county of 50 acres for 6 months before election may vote for State senator.	Paid public taxes, may vote for member of H. C.				

[1] In New Hampshire, Massachusetts, Connecticut, and Vermont in the eighteenth century, most of the electors were church members.

Qualifications of electors prescribed by the Constitutions, 1776–1800—Continued

State	Constitution	Age	Residence	Property	Taxation	Religion	Sex	Race	Native or naturalized
South Carolina	1776 [2]								
	1778	21	1 year in State	Freehold of 50 acres or town lot or paid taxes equal to tax on 50 acres.		Acknowledges the being of a God and a future state of rewards and punishments.	Male	White	
	1790	21	2 years citizen of the State.	Same as in 1778	If not freeholder, has paid tax of 3s. sterling.		do	do	
Georgia	1777	21	6 months in State	Property of £10 or being of a mechanic trade or a taxpayer.					
	1789	21	6 months in county, citizens and inhabitants of the State.						
	1798	21	do		Taxpayer				
Kentucky	1792	21	2 years in State or 1 year in county.				Male		
	1799	21	do				do	White	
Tennessee	1796	21	6 months in county	Freehold			do		

[2] Qualifications "as fixed by law," see table, p. 41.

The qualifications of electors as prescribed by law

State	Date of law	Age	Requirements
Massachusetts	Mar. 23, 1786		Freeholders who pay 1 single tax, besides the poll, a sum equal to two-thirds of a single poll tax.
Rhode Island	1762	21	Inhabitants. £40 in realty, or 40s. per annum rent, or eldest son of freeholder.
Connecticut	1715	21	Realty—40s. per annum, or £40 in personal estate.
New York	Mar. 27, 1778		Every mortgagor or mortgagee in possession, and every person possessed of a freehold in right of his wife, vote viva voce for senators and assemblymen; by ballot for governor and lieutenant governor.
New Jersey	Feb. 22, 1797	21	Free inhabitants having £50 property, and 12 months in the county. Women, aliens, and free Negroes, thus qualified, voted.
Pennsylvania	Feb. 15, 1799	21	Citizen of State 2 years, paying State or county tax 6 months before the election; sons of electors vote "on age"; i. e., at 21, without payment of the tax.
Maryland	October 1785 Dec. 31, 1796		Free Negroes not to be electors.
Virginia	Law of 1762–69		Free Negroes and women not to be electors; an elector a freeman having 500 acres of land unsettled, or 25 acres settled, having thereon a house 12 by 12. Elector voted in the county in which the greater part of his land lay, if it lay in 2 counties.
Do	Law of 1781		Poll tax—½ bushel wheat, or 5 pecks oats, or 2 pounds sound bacon. Repealed November 1781, and made 10s.
South Carolina	Oct. 7, 1759		Elector—free white man possessing settled freehold estate, or 100 acres unsettled, or £60 in houses, or paying a tax of 10s.

Neither by the Constitution nor the law were free Negroes (males) denied the right to vote in New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, or Tennessee. There is evidence that they voted in New Jersey from 1776 to 1807 (see act of November 16, 1807, limiting the right to vote to free white male citizens); in New York (acts of March 27, 1778; April 11, 1815; April 19, 1822); in Pennsylvania under Constitution of 1776 (see debate on inserting the word "white," as descriptive of the elector, in the report of the Constitutional Convention of 1838); in North Carolina (see debate on "abrogating the right of free persons of color to vote," under Constitution of 1776, in debates of the Constitutional Convention of 1835); in Tennessee, from 1776 to 1834 (see Caldwell's *Constitutional History of Tennessee*, p. 93, and compare the qualifications of the elector under the two constitutions). In New England, if the town-meeting admitted the free Negro to a citizen's rights, he could vote. Public opinion in Rhode Island refused him admittance (see Constitutional Convention, 1818, Art. vi, Sec. 2; and of Rhode Island, 1842, Art. ii, Secs. 1, 2). It was not an established right in law, in 1842, that a person having African blood in his veins could be a citizen of the United States; he could not become such by naturalization, as the law restricted naturalization to white men. Free persons of color [1] were denied the right to vote in New Jersey, by act of Assembly, in 1807; in Tennessee, by the Constitution of 1834; in North Carolina, by constitutional amendment, in 1835; in Pennsylvania, by the Constitution of 1838. Thus, of the States that originally allowed them the right, New Hampshire, Vermont, Massachusetts, and New York never withdrew it.

[1] In New Jersey the right was taken away from them, from aliens, and from females—inhabitants—by the Constitution of 1776, by act of Assembly, November 16, 1807. See debate on "abrogating the right of free persons of color to vote;" Proceedings and Debates of the Convention of North Carolina Called to Amend the Constitution of the State, which assembled at Raleigh, June 4, 1835, to which are subjoined the Convention Act, the Amendments to the Constitution, together with the Votes of the People. Raleigh, 1836, pp. 351, et seq. See also Curtis's dissenting opinion, *Scott* vs. *Sandford*, 19 Howard, 393. There is no evidence that free persons of color voted in colonial times.